CPUC cannot deny its responsibility for regulating cellular service in California. That regulation has included protection of select competitors at the consumers' cost, unnecessary tariffing requirements and denial of innovative pricing programs commonly available elsewhere.[65] Even during the pendency of this proceeding the CPUC has backed away from the pricing flexibility which it touted in its Petition as evidence of its progressive approach to regulation.[66] Last week, at the behest of the resellers and Nextel, the CPUC stayed its prior order allowing cellular carriers to introduce new service plans to consumers on one days' notice.[67] Until this matter is resolved, the public will be denied the benefit of new offerings. It is widely recognized that regulation requiring advance notice of pricing changes to competitors inhibits such offerings.[68] Thus the effect of the CPUC's action is not merely a 30 day delay in the introduction of new services and/or rate plans, but complete abandonment of novel programs. This retreat to "command and control" regulation should be regarded by the Commission as indicative of the CPUC's failure to recognize how competition works, and of its inability

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65 AirTouch Opposition at 63-68; U S WEST Opposition at 6-12; LACTC Response at 40-47; Bakersfield Response at 3-7; GTE Comment at 60-65.

66 Petition at 18.

67 CPUC "Order Granting Limited Rehearing of Decision 94-04-043," dated October 12, 1994, in CPUC Investigation I.88-11-040.

68 AirTouch Opposition, Appx. E at 7.

appropriately to provide incentives that promote competitive behavior.

Far from opening California markets to increased competition, the net effect of the CPUC's regulation has been reduced opportunities for competition and higher prices for consumers. The CPUC's regulation has cost consumers approximately $250 million per year--an amount that is growing even larger with each passing day. The CPUC now seeks to continue and even augment its regulation, with a projected additional cost of $500 million to consumers over the next 18 months. There is no evidence that would warrant imposing this cost on California consumers.

Nextel has identified the negative impact of regulation, imposing the additional costs of regulatory compliance on consumers and constraining competitors' ability to react to the marketplace.[69] There is no justification for selectively imposing these burdens on cellular service and denying consumers the benefits of effective competition. AirTouch concurs with Nextel that "[w]hen healthy competition exists, no significant purpose is served by continued government regulation."[70] The record in this proceeding demonstrates that California cellular markets have exhibited the indicia of intense competition within the constraints of the traditional duopoly market structure. That structure has now been removed. California consumers

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69 Nextel Comments at 14.

70 Nextel Comments at 11.

should reap the benefits of "healthy competition" uninhibited by obsolete and misguided regulation.

IV. THE PETITION'S PROCEDURAL DEFECTS CANNOT BE CORRECTED.

Neither the comments submitted by the proponents of regulation, nor any additional evidence submitted by the CPUC, can correct the fundamental procedural defects that warrant summary dismissal of the Petition.

A. The CPUC's failure to provide its proposed rules requires dismissal.

The CPUC failed to "identify and provide a detailed description of the specific existing or proposed rules that it would establish if we were to grant its petition."[71] In fact, the CPUC admits that it intends to change its regulation of cellular service in subsequent proceedings.[72] As a result, the Commission cannot determine whether the authority requested by the CPUC is in fact "necessary" to protect subscribers if the CPUC refuses to describe exactly what rate regulations it intends to enforce.

Congress did not grant petitioning states unlimited power to regulate rates, as the CPUC has requested.[73] Rather, Congress gave this Commission authority to grant the states

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71 Second Report and Order at 1504-05; see Section 20.13(a)(2) and (b)(1) of the Commission's Rules; see also AirTouch Opposition at 6-14; CCAC Response at 90-91.

72 Petition at 81.

73 Petition at 1; see also AirTouch Opposition at 7-8; CCAC Response at 70, 92-93; GTE Comment at 11-13; U S WEST Opposition at 19-20.

limited power to "exercise under State law such authority over rates, for such period of time, as the Commission deems necessary."[74] The CPUC's failure to specify its rules and request for unlimited discretion are flatly at odds with the Congressional mandate and thus must be rejected.[75]

B. The CPUC's proposed regulatory scheme conflicts with federal standards.

The CPUC's failure to describe its proposed regulation was calculated to create the impression that its regulation was already in effect. To the contrary, the CPUC has improperly attempted to impose new rate regulation prior to receiving authorization from this Commission.

The most critical aspects of the CPUC's proposed regulatory scheme, the unbundling of wholesale rates and interconnection with a reseller switch,[76] were not part of California's "existing regulation," as of June 1, 1993.[77] Those requirements were adopted by the CPUC merely five days prior to filing the Petition. The CPUC's attempt to use the mechanism of a petition under Section 332(c)(3)(B) to evade preemption of its newly imposed regulations is clearly invalid.[78]

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74 47 U.S.C. § 332(c)(3)(B); see also AirTouch Opposition at 8; BACTC Opposition at 6; LACTC Response at 54; McCaw Opposition at 7-8.

75 CCAC Response at 90-91.

76 Petition at 81-82.

77 CCAC Response at xi, 10, 94, 96-101, Exh. C at 36-37; GTE Comment at 64 (fn 41); LACTC Response at 54-55; McCaw Opposition at 24-28; U S WEST Opposition at 17-18.

78 CCAC Response at 74-78, 87-90; U S WEST Opposition at 18-19.

Additionally, to the extent that the CPUC seeks authority to require interconnection of interstate calls, it is preempted under Section 2(a) of the Communication Act. 47 U.S.C. § 152(a).[79] Even if the CPUC's interconnection order applied only to intrastate calls, it might unlawfully impede federal policy that would preempt state regulation of intrastate interconnection arrangements among CMRS providers.[80]

Even the CPUC's limited description of the proposed regulation reveals that it is flatly at odds with the Congressional goal to "establish a symmetrical regulatory structure" in order to promote competition.[81] The CPUC's unbundling directive, imposed solely on cellular carriers, and not on wireless service providers like Nextel, creates the very type of disparate regulatory burden that Congress sought to eliminate.[82] Moreover, the CPUC's intent to impose cost based regulation, as it deems necessary, demonstrates that it seeks authority to create an entirely different standard for California totally at odds with the goal of a "symmetrical" regulatory structure.

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79 See, e.g., AirTouch Opposition at 18-20; CCAC Response at 33-35.

80 See Equal Access NPRM, ¶¶142-43; see also CCAC Response at 74-78, 80.

81 Second Report and Order at 1418.

82 AirTouch Opposition at 20-23; CCAC Response at 74-78, 80, 103-105; GTE Comment at 65-66; LACTC Response at 49-54; McCaw Opposition at 9-11.

C. The CPUC has improperly relied on confidential information.

The CPUC's improper confidential submission denied the public an opportunity to comment on the Petition.[83] This Commission cannot, consistent with its own rules, the APA, and due process of law, rely upon the non-public portions of the evidence submitted by the CPUC.[84] Even the CPUC now apparently recognizes this fundamental fact.[85] In an attempt to avoid dismissal of its Petition, the CPUC would permit the release of the highly sensitive competitive data to the public.[86] The

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83 Second Report and Order at 1504. See Section 20.13(a)(5) and (6)(1) of the Commission's Rules. See, e.g., National Black Media Coalition v. F.C.C., 791 F.2d 1016, 1023 (2d Cir. 1986). See also AirTouch Opposition at 8, 14; BACTC Opposition at 3, 6-8, 13, 17; CCAC Response at 54-55; LACTC Response at 6-7; McCaw Opposition at 28-30.

84 The CPUC belatedly revealed a portion of the confidential data submitted to the Commission. In fact, the CPUC's newly revealed data supported the findings of the cellular carriers. For example, the CPUC's data reflects a 34% subscriber growth rate in major markets. Petition at 35, revised September 13, 1994. The CPUC fails to explain the exponential growth rate in the face of allegedly high prices. The CPUC claims prices have not declined yet its data reveals that the number of customers on basic plans in major markets declined from 72% in 1989 to 37% in 1993. Petition at 41, revised September 13, 1994. The CPUC's calculations reveal that the discount plans do in fact provide subscribers with price reductions, up to 18% over the basic rate. Petition at 43, revised September 13, 1994.

85 See "Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained In Oppositions to California's Petition to Retain State Regulatory Authority Over Intrastate Cellular Service," dated September 29, 1994, at ¶10. No party, other than the CPUC, has submitted confidential information to the Commission under seal and requested that the FCC rely upon such information. To the contrary, the Hausman Affidavits submitted by CTIA and AirTouch are part of the public record in this proceeding.

86 "Comments of California in Support of Protective Order," at 10, dated October 6, 1994.

CPUC also chastises the cellular carriers because they refrained from seeking access to their direct competitors' sensitive data.[87]

The CPUC's cavalier treatment of the confidential information is a further illustration of its fundamental failure to understand the true nature of competition. The CPUC would release highly sensitive data to direct competitors, apparently unable to recognize the anticompetitive impact of such an action.[88] The CPUC simply lacks the objectivity and insight to regulate in a manner consistent with the federal goal of promoting competition among wireless services.

V. CONCLUSION.

For the reasons stated herein and in AirTouch's opening comments, the CPUC has failed to meet its burden of proof to present evidence of a demonstrated failure of market conditions in California to protect subscribers. Moreover, the CPUC cannot rectify the fundamental procedural defects which are fatal to

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87 Id. at 4.

88 See, e.g., BACTC Opposition at 8. See also "Comments of AirTouch Communications on the Draft Protective Order," at 2-6, dated October 7, 1994.

the Petition. Accordingly, the CPUC's Petition must be denied or dismissed.

Dated: October 19, 1994

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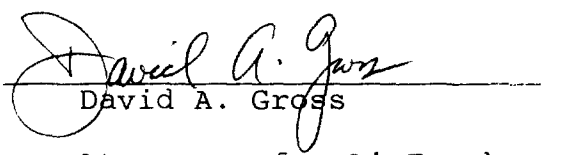
By: 
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CERTIFICATE OF SERVICE

I, Tina L. Murray, do hereby certify that copies of the foregoing "Reply of AirTouch Communications in Opposition to CPUC Petition to Rate Regulate California Cellular Service", were sent via first class mail, postage prepaid, on this 19th day of October, 1994 to the following parties.

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